THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
CONOR CHURCH	)	OEA Matter No. 1601-0044-20
Employee	)	
	)	Date of Issuance: May 27, 2021
v.	)	
METROPOLITAN POLICE DEPARTMENT	)	JOSEPH E. LIM, Esq.
Agency	)	Senior Administrative Judge
	)	

Donna Rucker, Esq., Employee Representative
Teresa Quon-Hyden, Esq., Agency Representative

INITIAL DECISION[1]

PROCEDURAL BACKGROUND

On May 6, 2020, Conor Church ("Employee"), a former Sergeant in the Police force, filed a Petition for Appeal with the Office of Employee Appeals ("OEA") appealing the Metropolitan Police Department's ("Agency" or "MPD") final decision demoting him from his position. After this matter was assigned to me on December 17, 2020, I held a Prehearing Conference on February 18, 2021. Following the Prehearing Conference, the parties submitted briefs on this matter. Upon consideration of the briefs submitted in this matter, I determined that an Evidentiary Hearing was not warranted. The record is now closed.

JURISDICTION

The Office has jurisdiction in this matter pursuant to D.C. Official Code § 1-606.03 (2001).

ISSUES

1) Whether Agency's action of terminating Employee was done for cause; and

2) If so, whether the penalty of removal is within the range allowed by law, rules, or regulations.

UNCONTROVERTED FACTS[2]

Based on the record and the stipulated facts, the following facts are undisputed:

1 This decision was issued during the District of Columbia's Covid-19 State of Emergency.
2 Derived from the parties' joint stipulations of facts and uncontested documents and exhibits of record.

1. Employee was appointed to MPD on March 11, 2013, and later assigned to the First District (1D).

2. This appeal arises out of two separate incidents—the first on October 6, 2019, and the second incident on October 7, 2019, the very next day.

3. **The October 6, 2019 Incident**:

a. On October 6, 2019, at approximately 2044 hours, Sixth District Sergeant Joseph Hudson responded to the 300 block of 57th Street, NE, to assist with the recovery of shell casings. The Sixth District did not have crime search officers available. Sergeant Hudson switched to the 1D radio channel to ask if a 1D officer could assist. Employee was on-duty as Cruiser 1040 and advised Sergeant Hudson to switch to the 1D Tactical channel.[3]

b. Once on the 1D Tactical channel, Employee made statements deemed by MPD to be inappropriate to Sergeant Hudson before agreeing to send a 1D officer to assist. More specifically, Employee stated, "1D units do not pick up hood rat shell casings, alright. If there is a shell casing to be recovered by 1D, they have better been used to shoot Abraham Lincoln or James Garfield."[4]

c. On October 7, 2020, Sixth District Watch Commander, Lieutenant Sean Hill, designated these incidents as IS# 19-003461.[5]

d. The matter was assigned to First District Lieutenant Daniel Dyn to investigate.

e. On October 16, 2019, Lieutenant Dyn obtained a PD 119[6] from Employee, in which he admitted that his "hood rat" statement was "wholly inappropriate" and "undeniably offensive." His statement reads as follows:[7]

> On October 6, I was working in the First District when I heard a Sixth District unit requesting the assistance of a Crime Scene Search Officer, and I switched to Tac Channel. Recognizing the Sixth District official's voice as a longtime friend and colleague, I made a joke on Tac which was intended to refer to the differences between the scene at my current First District assignment and the Sixth District, which I had proudly served for years. Although made in jest, the regrettable comment that I made was wholly inappropriate, and used language which in retrospect is undeniably offensive.

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3 *See* Agency Exhibit 1, Final Investigative Report Regarding the Alleged Misconduct (Orders/Directive) by First District Sergeant Conor Church, IS# 19-003461, dated October 30, 2019, at pg. 1.
4 Agency Exhibit 1 at pgs. 1-3.
5 Agency Exhibit 1 at pg. 2.
6 A PD 119 is a written statement signed by both the target/witness and the official ordering the PD 119. When there is an allegation of misconduct, an official may order the target(s) and any witnesses to complete a PD 119.
7 *See* Agency Exhibit 1 at pg. 2 and Attachment #2.

Agency states that Employee's joke was about:

i. Shots fired call and recovering shell casings in the Sixth District where gun violence has ravaged the community.

ii. The differences between the First District, which contains the federal enclave and the downtown business area, and the Sixth District, with its largely African-American population, more impoverished residential areas, and neighborhood crews and gangs.

iii. Sixth District residents being "hood rats." Urban Dictionary defines a hood rat as a "person who lives and exhibits attitudes of inner city life, usually a negative connotation that implies poor upbringing, bad manners, little to no education and low class behavior." Urbandictionary.com. Similarly, Wiktionary defines a hood rat as "a poor inner-city resident, especially who dresses or associates with the urban or hip-hop culture." Wiktionary.org.

f. Sergeant Joseph Hudson provided a PD 119 on October 6, 2019, corroborating the fact that Employee's hood rat comment was unprofessional and contrary to the values of the Department. His statement reads as follows:

> On Sunday, October 6, 2019 I, Sgt. Joseph Hudson was working the IMPACT overtime from 1700-0130 operating as OT.[8] He stated that at approximately 2044 hours, he responded to assist uniformed officer to canvass the 300 block of 57th Street NE in reference to a call for the sounds of gunshots. Officers on scene located several shell casing in the area and requested a District Crime Scene certified officer to respond to recover the evidence. Members were advised that there were no available members within the 6th District to assist. As the official on scene, I switched my radio to the 1st District radio zone and requested assistance in the recovery of said evidence. An official cruiser "1040" responded to my request and advised me to switch the 1st District's tactical channel. I switched over and the official cruiser 1040 replied something to the nature of "1D is not responding and recovering hoodrat shell casing from the 6th District unless they were used to shoot at President Lincoln." This statement may not be the exact verbiage but it is to the best of my recollection. I responded, "I Copy Sir! So you will be sending a unit to assist us in recovering these shell casings." I was unaware which official made the statements at the time of the incident, as I did not request their name. The statement was unprofessional and does not line up with the core values and mission of the Metropolitan Police Department. I do not condone this behavior and language being used by any member of this agency. However, based on the joking tone I do not believe that the individual making the statement meant any malice or ill will with the

8 Overtime.

comment.[9]

g. The 1D Tactical channel communication between Employee and Sergeant Hudson is transcribed below:[10]

Sergeant Hudson: Uh 1040, are you on the air?

Sergeant Church: ID units do not pick up hood rat shell casings, alright. If there is a shell casing to be recovered by ID, they have better been used to shoot Abraham Lincoln or James Garfield.

Sergeant Hudson: So I take it you're sending me a unit to assist us with recovering these shell casings, Sir?

Sergeant Church: Ya, no problem Jay. Um, let me see who is in service. I have a couple of people, so I will send someone over. What is the location?

Sergeant Hudson: It will be 300 57th St SE

Sergeant Church: Copy that, 604 again man.

Sergeant Hudson: Thank you, and if you could just have them raise 6051. They will be handling the report.

Sergeant Church: Copy

h. On October 30, 2019, Lieutenant Dyn submitted the Final Investigative Report sustaining allegations of misconduct. At the conclusion of his report, Lieutenant Dyn wrote the following:[11]

The remarks made were not just insensitive, but if made public, would bring discredit to the reputation of the Department. While made in jest, the content of Sergeant Church's statement is no laughing matter. To the residents of communities effected by gun violence, shots being fired is a serious life-threatening issue. Sergeant Church's statement not only diminished the seriousness of the situation, but inappropriately described the shell casings as "hoodrat". Not only is this phase harsh and profane, it is utterly disrespectful and offensive.

Sergeant Church has taken full responsibility for his words and the harm they could cause. However, this does not alleviate the consequences of his actions. Although Sergeant Church is a newly promoted sergeant and has shown an enthusiasm to be an effective leader, the remarks that he made cause reservation about his ability to

9 Exhibit 1 at pg. 3 and Attachment 3.
10 Agency Exhibit 1 at pgs. 3 and 4.
11 Agency Exhibit 1 at pgs. 5-6.

effectively lead members of this Department.

4. **The October 7, 2019 Incident**:

a. On October 7, 2019, at approximately 2145 hours, a report of an armed carjacking was voiced over the 1D radio channel. Officers observed the vehicle fleeing from the scene. The suspects abandoned the vehicle in the 600 block of North Carolina Avenue, SE, and began fleeing on foot. Officers gave chase.[12]

b. Employee responded to the scene and twice attempted to transmit on the radio. He was unable to do so due to multiple members transmitting over each other. Employee was able to transmit on his third attempt and stated, "Ok, hold the air. This is a bail-out, if you don't have a person in front of you, shut the fuck up." The carjacking suspect was ultimately apprehended.[13]

c. Lieutenant Felicia Lucas, the First District Watch Commander obtained IS# 19003489 on October 8, 2019.[14] She summarized the events in the IS Sheet as follows:[15]

> On 10-7-19 1D units received a call for a carjacking. Moments later the vehicle was seen by CST units. An unknown member requested from the Midnight Watch Commander, Lieutenant Felicia Lucas, if they could pursue. Lieutenant Lucas related not to pursue. Multiple radio transmissions were voiced as Lieutenant Lucas queried if the carjacking was armed but her radio was being blocked due to continued radio traffic. Moments later Sergeant Conor Church was heard stating in part, "Shut the fuck up!"

d. Lieutenant Dyn was also assigned this matter to investigate.[16]

e. Employee provided a PD 119 on October 16, 2019, in which he admitted to the use of profanity. He wrote in his statement:[17]

> On October 7, I responded to a radio assignment for an Armed Carjacking at the intersection of 8th Street NE & H Street NE. While I was en route, I heard a First District unit voice over the radio that he had the vehicle in sight. Because I was only a few blocks out, I responded to that location to assist. Shortly thereafter, as I was approaching the area, the Officer voiced that the driver of the carjacked vehicle had bailed out and run behind the

12 Final Investigative Report Regarding the Alleged Misconduct by First District Sergeant Conor Church, IS# 19-003489, attached as Agency Exhibit 2 at 1.
13 Agency Exhibit 2 at pgs. 2 and 3.
14 Agency Exhibit 2 at pg. 3.
15 Agency Exhibit 2 at pg. 2 and Attachment #1.
16 Agency Exhibit 2 at pg. 2.
17 Agency Exhibit 2 at pg. 3 and Attachment 2.

> Aquatic Center at 635 North Carolina Avenue SE. I immediately turned behind the Aquatic Center and began canvassing for the suspect or the officers who were involved in the foot chase. However, the radio air soon became cluttered with multiple superfluous transmissions, which I knew would be inhibiting the Officers involved in the foot chase from transmitting their own locations. Because I knew that the Officers were out on foot behind a potentially armed and violent criminal suspect, putting themselves in grave risk, I became irritated that other units were putting them at further risk by transmitting unnecessarily. I made a short transmission to remind all the units that the air needed to be restricted for the foot chase, and I inadvertently used a curse word.

f. On December 17, 2019, Lieutenant Dyn submitted the Final Investigative Report sustaining allegations of misconduct. Regarding his finding he wrote:

> Sergeant Church stated that he made the transmission because he was concerned for the officers' safety due to "superfluous transmissions" on the radio channel. While the investigating official agrees that there were issues with radio discipline, Sergeant Church's transmission itself unnecessarily took up airtime. Instead of simply advising the dispatcher to hold the air, Sergeant Church expressed his frustration over the radio channel. As a first line supervisor, Sergeant Church is expected to provide guidance to his subordinates not only in directives but in his actions as well.
>
> It is essential for a first line supervisor to maintain their composure in stressful situations. Sergeant Church's inability to maintain his composure in this situation causes concern, however this was not a thought-out and deliberate act. Sergeant Church made a mistake and there is a positive potential for his rehabilitation. While this investigation yields that an Official Reprimand would be appropriate, Sergeant Church has a previous similar violation that was investigated and sustained under IS# l9003461. In accordance with General Order 120.21, the appropriate penalty for a second orders and directives violation, is the recommendation for adverse action.

5. On February 11, 2020, Sergeant Church was served with a Notice of Proposed Adverse Action.[18] In the notice, Disciplinary Review Division Director Hobie Hong charged Employee as follows:

Charge No. 1: Violation of General Order Series 120.21, Attachment A, Part A-16, which states, "Failure to obey orders or directives issued by the Chief of Police."

Specification No. 1: In that, on October 6, 2019, following a request from an official

18 Agency Exhibit 3 at ps. 1-2. Notice of Proposed Adverse Action, served on February 11, 2020.

from the Sixth District for a First District crime scene search officer to respond and assist them, you stated over the First District tactical zone, "1D units do not pick up hood rat shell casings, alright. If there is a shell casing to be recovered by 1D, they have better been used to shoot Abraham Lincoln or James Garfield." This misconduct is further described in General Order 201.26, Part V.C.3, which states, in part: "All members shall: Refrain from harsh, violent, coarse, profane, sarcastic, or insolent language."

Specification No. 2: In that on October 7, 2019, while responding to the scene of a foot pursuit following a bail-out, you stated over the First District radio zone, "Ok, hold the air. This is a bail-out, if you don't have a person in front of you, shut the fuck up." This misconduct is further described in General Order 201.26, Part V.C.3, which states, in part: "All members shall: refrain from harsh, violent, coarse, profane, sarcastic, or insolent language."

Specification No. 3: In that, on October 7, 2019, while responding to the scene of a foot pursuit following a bail-out, you stated over the First District radio zone, "Ok, hold the air. This is a bail-out, if you don't have a person in front of you, shut the fuck up." This misconduct is further described in General Order 302.05, Part l-B, which states, in part: "The following acts are prohibited in regard to mobile portable radios: (1) Transmissions of profane or indecent language."

Charge No. 2: Violation of General Order Series 120.21, Attachment A-Part A-12, which reads, "Conduct unbecoming an officer, including acts detrimental to good discipline, conduct that would adversely affect the employee's or the agency's ability to perform effectively, or violations of any law of the United States, or of any law, municipal ordinance, or regulations of the District of Columbia."

Specification No. 1: In that, on October 6, 2019, you stated on the tactical radio zone, "1D units do not pick up hood rat shell casings, alright. If there is a shell casing to be recovered by 1D, they have better been used to shoot Abraham Lincoln or James Garfield."

Specification No. 2: In that, on October 7, 2019, you stated over the First District's radio zone, "Ok, hold the air. This is a bail-out, if you don't have a person in front of you, shut the fuck up."

6. Having found misconduct, the Director of the Disciplinary Review Board weighed the *Douglas* factors[19] and found the following factors to be aggravating:[20]

   1. The nature and seriousness of the offense, and its relation to the employee's duties, position, and responsibilities, including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated.

19 *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 305-306 (1981).
20 Agency Exhibit 3 at pgs. 2-4.

This office holds this to be an aggravating factor. This incident is significant, as you are a first line supervisor, and as such, you expected to maintain your professionalism and composure and be an example for your subordinates. On two (2) separate occasions you used inappropriate language and/or profane language while broadcasting over a radio zone. This misconduct raises concerns surrounding your judgment to include your responsibilities as an official. While your motivations are not completely known, your actions were clearly intentional.

2. The employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position;

This office holds this to be an aggravating factor. As previously stated, you are an official on the department and have sworn to uphold the law and follow the rules of the Department. As such, you are held to a higher standard of conduct. Given the mission of the agency, and duties and responsibilities of a police officer, your misconduct is significant.

3. The employee's past disciplinary record;

This office holds this to be an aggravating factor. A review of your work history revealed that you have one (1) prior sustained adverse action within the past three (3) years.

DRB# 967-16 & IS# 14-001733 Orders & Directives – Excessive Force
Penalty: 3 Days SWOP & 3 Days held in abeyance
Disposition date: June 12, 2017

4. The employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability;

This office holds this to be an aggravating factor. You are a six (6) year member of the MPD, appointed March 11, 2013. While there is no evidence presented in the investigative report to indicate you are unable to get along with your fellow workers, your actions on two separate dates raise serious concerns regarding your ability to get along with fellow workers and overall temperament in carrying your duties. This raises doubt regarding your dependability as not only a law enforcement officer, but as a supervisor of others within this department.

5. The effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in the employee's ability to perform assigned duties;

This office holds this to be an aggravating factor. Your use of insolent, sarcastic, and profane language broadcast over the radio raises serious concerns about your

judgment as a police sergeant. Your conduct was contrary to your responsibility as an official of the Metropolitan Police Department. As such, it is reasonable to conclude that your actions have eroded the agency's confidence in your ability to satisfactorily perform your duties and responsibilities in your present capacity.
* * * *

9. The clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question;

This office holds this to be an aggravating factor. As a sergeant and six (6) year member of the Department, there is no doubt that you were aware, or should have been aware, that your conduct as described in the attached investigative report was inappropriate, unprofessional, and in violation of Departmental regulations. As a sergeant, you are a supervisor and expected to lead by example. Your failure to act accordingly is not only disappointing but shows a clear lack of understanding regarding the nature of the role in which you currently serve.

7. After weighing the *Douglas* Factors, Director Hong proposed Employee be demoted to the rank of officer and serve a 15-day suspension.[21]

8. Employee did not submit a response to the Notice of Proposed Adverse Action.

9. On March 10, 2020, Employee was served with the Final Notice of Adverse Action, upholding the penalty.[22]

10. On March 24, 2020, Employee submitted an appeal to the Executive Office of the Chief of Police.[23] In his appeal, Employee wrote:[24]

The facts are exactly as your team's investigation found: I did accidentally say "fuck" over the radio while en route to an armed carjacking bailout. I did refer to "hoodrat shell casings" while making a joke about the First District's proud place In US History. I've always had a problem with my language, probably made worse by the United States Marine Corps, but I work daily to reduce my use of crude language. Mostly, I'm successful, as evidenced by my years of dedicated service in the Sixth District with only one sustained complaint -- six years ago. But in these two cases, I wasn't successful, and I'll be the first to admit that my language was crass and disrespectful. In fact, I self-reported the incident to my Lieutenant before the IS numbers were even drawn.

Thus, my respectful request to appeal the adverse action isn't borne from any ill-

21 Agency Exhibit 3 at pg. 4.
22 Agency Exhibit 4. Final Notice of Proposed Adverse Action, served on March 10, 2020.
23 Agency Exhibit 5. In Response to: Final Notice of Adverse Action, DRD Case Number 644-19/731-19, IS 19-003461/003489.
24 Agency Exhibit 5 at pg. 1.

founded perception that I'm not guilty of those two infractions. It is simply that I feel the proposed discipline is too severe.

11. The Chief of Police denied Employees appeal in part on April 10, 2020.[25] He sustained all charges and the demotion but rescinded the 15-day suspension. In his response, Chief Peter Newsham wrote:[26]

> In conclusion, you reiterate that you take responsibility for your foul and demeaning language. You contend that you understand that it has no place in a modem police department. You state, I truly believe that I can continue to be an effective, respectful, and respectable supervisor on your Metropolitan Police Department.
>
> I have reviewed your letter and the record. I appreciate that you have taken responsibility for your actions. The facts are not in dispute. Your argument that certain charges and specifications are duplicative, and should therefore be dismissed, is unpersuasive. The Department has the discretion to charge misconduct as it sees fit. In this case, your admitted misconduct violated multiple Departmental directives. There is no basis to revise the charges or specifications. Accordingly, all charges and specifications are sustained.
>
> Your use of the term "hood rats" is extremely troubling. As an official, you are held to a higher standard and you are expected to set an example for subordinate officers. We serve the citizens of the District of Columbia. It is never acceptable to refer to any member of our community by using such a demeaning term, whether in private or in public. It is particularly egregious to do so as an official over a broadcast radio channel.
>
> While cursing over the air as you did during the armed carjacking incident is not acceptable, that misconduct alone would not merit a demotion. Referring to citizens as vermin, however, requires no lesser penalty. There appears to be a pattern of similar inappropriate conduct. The fact that these incidents occurred in such a short timeframe raises serious concerns about your capacity to exercise good judgment.
>
> I acknowledge your prior commendable service to the Department, particularly where you placed yourself in life-threatening danger and sustained serious injuries. Accordingly, Douglas factor No. 4 is revised from "aggravating' to "mitigating." However, this reclassification does not sufficiently mitigate the misconduct in these cases to justify a reduction in the penalty, other than as described below. Your remaining Douglas factor arguments are unpersuasive.
>
> Accordingly, upon a thorough review of your letter and the record, I have decided to deny your appeal, in part. All charges are sustained. The demotion to the rank of officer is sustained. However, the 15-day suspension is rescinded in light of the factors discussed above.

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25 Agency Exhibit 6. Final Agency Action, dated April 10, 2020.
26 Agency Exhibit 6 at pg. 2.

Agency's Position[27]

Agency contends that Employee was guilty of violating General Order Series 120.21, Attachment A-Part A-12, which reads, "Conduct unbecoming an officer, including acts detrimental to good discipline, conduct that would adversely affect the employee's or the agency's ability to perform effectively, or violations of any law of the United States, or of any law, municipal ordinance, or regulations of the District of Columbia." Agency also contends that Employee violated General Order Series 120.21, Attachment A, Part A-16, which states, ''[f]ailure to obey orders or directives issued by the Chief of Police." Specifically, Employee was charged with disobeying General Order 201.26, Part V, Section C-3, which states, "[a]ll members shall: Refrain from harsh, violent, coarse, profane, sarcastic, or insolent language. Members shall not use terms or resort to name-calling, which might be interpreted as derogatory, disrespectful, or offensive to the dignity of any person." Specifically, Employee admitted making verbal statements as a "hood rat shell casings" on October 6, 2019, while remarking about a First District neighborhood. Employee also admitted saying, "Shut the fuck up" over the First District's radio zone on October 7, 2019. Agency contends that Employee's words are profane, utterly disrespectful and offensive.
Agency asserts that its penalty of a demotion in rank for Employee is reasonable and appropriate as it is within its range of penalties for Employee's conduct. It points out that Agency engaged in an intensive Douglas Factor analysis and that it had already reduced the penalty by eliminating a proposed 15-day suspension.

Employee's Position[28]

Employee denies any racist or other malicious intent and points out that he had responsibly admitted to his conduct. Employee also argues that his penalty is arbitrary, capricious, and an abuse of discretion. Lastly, Employee takes issue with Agency's Douglas Factor analysis and alleges disparate treatment.

ANALYSIS AND CONCLUSIONS OF LAW

1) Whether Agency's action of terminating Employee was done for cause; and

In this matter, Employee has admitted to the misconduct alleged by Agency. This Office has consistently held that an employee's admission of misconduct is sufficient for Agency to meet its burden of proof and establish cause for adverse action.[29] I also note that Employee's use of profanity over the radio to "shut the fuck up" officers not involved in a chase and referring to residents of the Sixth District as "hood rats" are not matters of public concern and therefore do not enjoy First Amendment protection.[30] Similar to the employee in *Jason Gulley v.*

27 *See* Agency Brief (March 9, 2021) and Agency's Response to Employee's Brief (March 30, 2021).
28 Employee's Brief (August 13, 2020).
29 *Employee vs. Agency*, OEA Matter No. 1601-0047-84, 34 D.C. Reg. 804, 806 (1987).
30 *See Marvin Pickering v. Board of Education of Township High School District 205*, 391 U.S. 563 (1968); *Connick v. Meyers*, 461 U.S. 138, 147 (1983).

Metropolitan Police Department,[31] Employee's use of the slang word "hood rats" generalizes negative attributes to the people in the 6th District" and was made while at work during the course of doing his job.[32] Therefore, Employee's statement regarding "hood rats" are not protected under the First Amendment.

2) If so, whether the penalty of removal is within the range allowed by law, rules, or regulations.

Disparate Treatment

However, Employee alleges that he was a victim of disparate treatment in that other officers had not been demoted as he has for the same offense. OEA has historically held that if an employee is singled out for punishment or is punished in a disproportionate manner as compared with other similarly-situated employees, the punishment may be reviewed for consistency and may be reduced or reversed altogether.[33] Over the years, OEA has reasoned that an employee who raises an issue of disparate treatment has the burden of making a *prima facie* showing that they were treated differently from other similarly-situated employees.[34]

In *Hutchinson v. D.C. Fire Department*, OEA Matter No. 1601-0119-90, *Opinion and Order on Petition for Review* (July 22, 1994), the OEA Board provided the following as it relates to disparate treatment:

> A number of factors are important in determining whether a penalty is reasonable. Among these factors is whether or not the agency has meted out similar penalties for similar offenses. However, the principle of similar penalties for similar offenses does not require that agencies insist upon rigid formalism, mathematical rigidity, or perfect consistency regardless of variations, but that they apply practical realism to each situation to assure that employees receive fair and equitable treatment where genuinely similar cases are presented. . . . Employee bears the burden of showing that the circumstances surrounding the misconduct are substantially similar to the circumstances in the cases being compared. . . Normally, in order to establish disparate treatment, *the employee must show that they worked in the same organizational unit as the comparison employees, and they were subject to discipline by the same supervisor within the same general period.*[35] *(Emphasis added.)*

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31 OEA Matter No. 1601-0025-17R18, *Initial Decision of Remand* (Oct. 29, 2018).
32 *Id*. at p. 6.
33 *Employee v. Agency,* OEA Matter No. 1601-0180-81, 31 D.C. Reg. 2186 (1984); *Harris v. Department of Human Services*, OEA Matter No. 1601-0188-91 (May 19, 1993); and *Alvin Frost v. Office of the D.C. Controller*, OEA Matter No. 1601-0098-86R94 (May 18, 1995).
34 *Hutchinson v. D.C. Fire Department*, OEA Matter No. 1601-01190-90, *Opinion and Order on Petition for Review* (July 22, 1994); *Lewis v. Department of Veteran Affairs*, 113 M.S.P.R. 657 (2010).
35 Citing *Douglas v. Veterans Administration,* 5 M.S.P.R 280 (306-307)(1981); *Bess v. Department of the Navy,* 46 M.S.P.R. 583 (1991); *Carroll v. Department of Health and Human Services,* 703 F.2d 1388 (Fed. Cir. 1983);

In the instant matter, Employee mentioned Lieutenant Craig Royal in *Craig Royal v. Metropolitan Police Department*[36] as a comparator in his disparate treatment argument. In that matter, Lieutenant Royal, a platoon leader in charge of MPD's Civil Disobedience Unit, had aggressively yelled an insult to a fellow lieutenant on January 20, 2009. Employee complains that for that more egregious act, Lieutenant Royal received a mere ten-day suspension compared to his demotion. However, Employee failed to provide information to show that Lieutenant Royal worked in the same organizational unit and was subject to discipline by the same supervisor within the same general period. I also note that Employee's conduct occurred in 2019, whereas Lieutenant Royal's actions occurred ten years earlier in 2009. Thus, I find that the two cases were not in the same general period.

Employee also cites the matter of Sergeant Michael Lawrence, who received a suspension of fourteen days for referring to his superior as a "fat bitch" or "fat pig" and sent demeaning text messages of a "pig with lipstick" further disparaging his colleague.[37] However, Employee again fails to show that he and Sergeant Lawrence worked in the same organizational unit or that they had the same supervisor. In addition, the misconduct occurred in different time periods as the Lawrence matter occurred in 2016.

Employee then cites the matter of Lieutenant Jason Gulley ("Gulley") as another comparator for his argument of disparate treatment.[38] Gulley publicly disparaged the residents of D.C.'s 6th District by stating that most of them were either on welfare or have arrest records. A more recent decision on Gulley was issued on remand. [39] Again, Employee fails to establish that he and Gulley worked in the same organizational unit or that they had the same supervisor. I also note that his charge of disparate treatment fails as Gulley received a demotion in rank and thirty days suspension, a penalty more severe than that meted to Employee.

Lastly, Employee cites the matter of Officer Eric Farris ("E.F.") who received a 12-day suspension for referring to citizens kicking him while attempting to control a uncooperative suspect as "animals" and cursing repeatedly on August 27, 2018.[40] Again, Employee fails to establish that he and Officer E.F. worked in the same organizational unit during the same time

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Kuhlmann v. Department of Health and Human Services, 10 M.S.P.R 356 (1982); *Mille v. Department of Air Force,* 28 M.S.P.R 248 (1985). *Also see Huntley v. Metropolitan Police Department,* OEA Matter No. 1601-0111-91, *Opinion and Order on Petition for Review* (March 18, 1994); *Adewetan v. D.C. General Hospital,* OEA Matter No. 1601-0021-93 (July 11, 1995); *Link v. Department of Corrections,* OEA Matter No. 1601-0079-92, *Opinion and Order on Petition for Review* (September 29, 1995); *Jordan v. Metropolitan Police Department,* OEA Matter No. 1601-0285-94, *Opinion and Order on Petition for Review* (September 29, 1995); *Shade v. Department of Administrative Services,* OEA Matter No. 1601-0360-94 (August 3, 1999); *Reynold Morris v. Office of State Superintendent of Education,* OEA Matter No. 1601-0261-10 (September 4, 2013); *Shalonda Smith v. D.C. Fire and Emergency Medical Services,* OEA Matter No. 1601-0195-11 (November 27, 2013); and *Shelby Ford v. Department of Youth Rehabilitation Services,* OEA Matter No. 1601-0066-13 (January 12, 2016).

36 OEA Matter No. 1601-0003-10 (March 28, 2013).

37 *Michael Lawrence vs. Metropolitan Police Department*, OEA Matter 1601-0036-2017 (June 11, 2018).

38 *Jason Gulley vs. Metropolitan Police Department*, OEA Matter 1601-0025-2017 (November 15, 2017).

39 *Jason Gulley vs. Metropolitan Police Department*, OEA Matter 1601-0025-2017R18 (October 29, 2018).

40 Employee Exhibit 8 – Eric Farris

period or that they had the same supervisor. Based on these, I find that Employee failed to show disparate treatment.

Douglas Factor Analysis

Next, Employee presented his argument as to why Agency's analysis of the *Douglas* Factors in determining his penalty is flawed by proceeding to present how Agency should have analyzed *Douglas* Factors 1, 4, 5, 7, 11, and 12. However, Employee's argument must fail. The OEA may overturn the agency decision only if it finds that the agency "failed to weigh the relevant factors, or that the agency's judgment clearly exceeded the limits of reasonableness." *Stokes v. District of Columbia*, 502 A.2d 1006, 1011 (D.C. 1985). "Not all of [the *Douglas*] factors will be pertinent in every case, and frequently in the individual case some of the pertinent factors will weigh in the [petitioner's] favor while others may not or may even constitute aggravating circumstances." *Douglas, supra*, 5 M.S.P.R. at 306. Although the OEA has "'marginally greater latitude of review' than a court, it may not substitute its judgment for that of the agency in deciding whether a particular penalty is appropriate." *Stokes*, 502 A.2d at 1011 (citing *Douglas*, 5 M.S.P.R. at 300). The "primary discretion" in selecting a penalty has been entrusted to agency management. *Stokes*, 502 A.2d at 1011.

> Selection of an appropriate penalty must ... involve a responsible balancing of the relevant factors in the individual case. The OEA's role in this process is not to insist that the balance be struck precisely where the OEA would choose to strike it if the OEA were in the agency's shoes in the first instance; such an approach would fail to accord proper deference to the agency's primary discretion in managing its workforce. Rather, the OEA's review of an agency-imposed penalty is essentially to assure that the agency did conscientiously consider the relevant factors and did strike a responsible balance within tolerable limits of reasonableness. Only if the OEA finds that the agency failed to weigh the relevant factors, or that the agency's judgment clearly exceeded the limits of reasonableness, is it appropriate for the OEA then to specify how the agency's decision should be corrected to bring the penalty within the parameters of reasonableness.[41]

Here, Agency has considerable latitude in how it presents and analyzes the *Douglas* Factors. There is no requirement that Agency performs this analysis to Employee's satisfaction. Agency adequately discussed each of the factors and presented its reasons for coming up with its choice of penalty. I must therefore find that Agency was within its managerial prerogative in how it performed its *Douglas* analysis.

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41 *Douglas*, 5 M.S.P.R. at 300) (internal quotations marks and bracketing omitted).

Finally, Employee argues that Agency should have levied a less severe penalty than demotion. Thus, the only remaining issue is whether Agency's choice of a demotion as its discipline was an abuse of discretion. Any review by this Office of the agency decision of selecting an adverse action penalty must begin with the recognition that the primary responsibility for managing and disciplining an agency's work force is a matter entrusted to the agency, not this Office.[42] Therefore, when assessing the appropriateness of a penalty, this Office is not to substitute its judgment for that of the Agency, but simply to ensure that "managerial discretion has been legitimately invoked and properly exercised."[43] When the charge is upheld, this Office has held that it will leave Agency's penalty "undisturbed" when "the penalty is within the range allowed by law, regulation, or guidelines and is clearly not an error of judgment."[44]

Based on the Agency's Table of Illustrative Penalties, the range of penalties for a first offense of insubordination ranges from a ten-day suspension to removal.[45] The penalty for a first offense of conduct unbecoming an officer ranges from a three-day suspension to removal.[46] The record shows that Agency's decision was based on a full and thorough consideration of the nature and seriousness of the offense, as well as any mitigating factors present. Based on this standard, my review of the record taken as a whole, demonstrates that there is substantial evidence in the record to support the penalty of demotion. For the foregoing reasons, I conclude that Agency's decision to demote Employee was not an abuse of discretion and should be upheld.

ORDER

It is hereby ORDERED that the agency's action of demoting Employee to a lower rank is UPHELD.

FOR THE OFFICE: /S/ *Joseph Lim*
JOSEPH E. LIM, ESQ.
Senior Administrative Judge

42 *See Huntley v. Metropolitan Police Dep't*, OEA Matter No. 1601-0111-91, *Opinion and Order on Petition for Review* (March 18, 1994); *Hutchinson v. District of Columbia Fire Dep't*, OEA Matter No. 1601-0119-90, *Opinion and Order on Petition for Review* (July 2, 1994).
43 *Stokes v. District of Columbia*, 502 A.2d 1006, 1009 (D.C. 1985).
44 *Employee v. Agency*, OEA Matter No. 1601-0158-81, *Opinion and Order on Petition for Review*, 32 D.C. Reg. 2915, 2916 (1985). *Taggert v. Metropolitan Police Department*, OEA Matter No. 2405-0113-92R94 (Jan. 9, 1998).
45 Agency General Order 120-21, Disciplinary Procedures and Processes, effective April 13, 2006.
46 *Id*.